

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

CITY OF SPOKANE, WASHINGTON,  
on behalf of itself and all  
others similarly situated,

Plaintiff(s),

vs.

FEDERAL NATIONAL MORTGAGE ASSOCIATION a/k/a FANNIE MAE, a federally chartered corporation; FEDERAL HOME LOAN MORTGAGE CORPORATION, a/k/a FREDDIE MAC, a federally chartered corporation; and FEDERAL HOUSING FINANCE AGENCY AS CONSERVATOR FOR FANNIE MAE AND FREDDIE MAC.

## Defendants.

NO. CV-13-0020-LRS

ORDER GRANTING DEFENDANTS' MOTION  
TO DISMISS PLAINTIFF'S AMENDED  
COMPLAINT

Amended Complaint, ECF No. 33, filed on March 15, 2013 and argued on May 29, 2013 in Yakima, Washington. Pursuant to Federal Rule of Civil Procedure 12(b), the Federal National Mortgage Association ("Fannie Mae"), the Federal Home Loan Mortgage Corporation ("Freddie Mac," and together with Fannie Mae, the "Enterprises"), and the Federal Housing Finance Agency as Conservator for Fannie Mae and Freddie Mac ("FHFA," and with the Enterprises, "Defendants") move for an order dismissing

1 Plaintiff's Amended Class Action Complaint (ECF No. 30) with  
2 prejudice.

3 **I. INTRODUCTION**

4 Plaintiff sued the defendants in an effort to collect state and  
5 local real estate transfer taxes that plaintiff claims are owed for  
6 real property transfers made by defendants. Federal statutes mandate  
7 that Defendants "shall be exempt from all taxation . . . imposed by  
8 any . . . State, county, municipality, or local taxing authority" with  
9 a single, narrow carve-out that "subject[s]" the Enterprises' "real  
10 property" to state and local "taxation . . . to the same extent . . .  
11 as other real property is taxed." 12 U.S.C. §§ 1452(e), 1723a(c)(2),  
12 4617(j)(2) (the "Exemption Statutes"). In an effort to get around the  
13 plain language of Exemption Statutes, plaintiff argues that when  
14 Congress exempted the defendants from "all taxation," it did not  
15 intend to exempt them from State and County real estate transfer  
16 taxes.

17 Defendants assert that Washington state tax and related "Local  
18 Option" taxes on real estate sales transactions (together, the  
19 "Transfer Tax") are not taxes on real property; they are excise taxes  
20 on the transfer of real property. See Wash. Rev. Code §§ 82.45.010,  
21 82.45.060, 85.46.010. The Transfer Tax therefore does not fall within  
22 the carve-out in the Exemption Statutes for taxes on real property.  
23 Instead, the Transfer Tax falls within the broad sweep of the plain  
24 language of the Defendants' exemptions from "all [state and local]  
25 taxation." Despite the straightforward statutory language, Plaintiff  
26 claims

1 Defendants must pay the Transfer Tax.

2 The issue before us is whether defendants' exemptions from "all  
 3 [state and local] taxation" include Washington State and County real  
 4 estate transfer taxes. Defendants point out that to date, 13 federal  
 5 district court decisions recently found that the Exemption Statutes  
 6 preclude imposition of functionally identical transfer taxes on real  
 7 estate transactions involving the Enterprises. See *Dist. of Columbia*  
 8 *ex rel. Hager v. Fed. Nat'l Mortg. Ass'n*, 882 F. Supp. 2d 107, at 111  
 9 (D.D.C.2012); *Hertel v. Bank of Am.*, No. 11-cv-757, 2012 WL 4127869,  
 10 at \*3 (W.D. Mich.2012); *Nicolai v. FHFA*, No. 8:12-cv-1335, 2013 WL  
 11 899967, at \*5 (M.D. Fla.2013); *Fed. Nat'l Mortg. Ass'n v. Hamer*, No.  
 12 3:12-cv-50230, 2013 WL 591979 (N.D. Ill.2013); *DeKalb Cnty. v. FHFA*,  
 13 No. 3:12-cv-50227 (N.D. Ill. 2013); *Montgomery Cnty., Maryland v.*  
 14 *Fannie Mae*, No. 8:13-cv-66 (D. Md. 2012); *Cape May Cnty., New Jersey*  
 15 *v. Fannie Mae*, No. 12-cv-4712 (D.N.J.2013); *Montgomery Cnty Comm'n v.*  
 16 *FHFA*, No. 2:12-CV-885, 2013 WL 1896256 (M.D. Ala.2013); *County of*  
 17 *Oakland v. FHFA*, Nos. 12-2135, 12-2136, 2013 WL 2149964 (6th Cir.  
 18 2013); *Delaware Cnty., Pa. v. FHFA*, No. 2:12-cv-4554, 2013 WL 1234221  
 19 (E.D.Pa.2013); *Hennepin Cnty. v. Fannie Mae*, No. 12-cv-2075, 2013 WL  
 20 1235589 (D. Minn.2013); *Vadnais v. Fannie Mae*, No. 12-cv-1598, 2013 WL  
 21 1249224 (D. Minn.2013); *Athens-Clarke Cnty. Unified Gov't v. Fed.*  
 22 *Hous. Fin. Agency*, No. 5:12-cv-355(MTT), 2013 WL 2102922 (M.D. Ga. May  
 23 14, 2013).

24 **II. LEGAL STANDARD FOR MOTION TO DISMISS**

25 To survive a motion to dismiss under Rule 12(b) (6), a complaint  
 26 "must contain sufficient factual matter, accepted as true, to 'state a  
 27

1 claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*,  
 2 556 U.S. 662, 678 (2009) (citation omitted). In considering such a  
 3 motion, a court must accept all factual allegations in a complaint as  
 4 true, but need not accept as true any legal conclusions. *Akhtar v.*  
 5 *Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012).

6 **III. EXEMPTION STATUTES UNAMBIGUOUS**

7 Defendants argue and this Court agrees, the statutes at issue  
 8 here plainly state that defendants are exempt from "all taxation"  
 9 imposed by the state or local taxing authority. See 12 U.S.C. §  
 10 1723a(c)(2) (Fannie Mae's charter); § 1452(e) (Freddie Mac's charter);  
 11 § 4617(j)(2) (Agency exemption). The statutes do not define "all" or  
 12 "taxation." Where terms are undefined, "[t]he everyday understanding  
 13 should count for a lot," and we look to "regular usage to see what  
 14 Congress probably meant." *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006).  
 15 "Taxation" is the "imposition or levying of taxes;" "the action of  
 16 taxing or the fact of being taxed." Oxford English Dictionary 679,  
 17 vol. XVII (2d ed. 1989).

18 "Shall" unambiguously expresses Congress's intent that the  
 19 exemption be mandatory. See *Miller v. French*, 530 U.S. 327, 337  
 20 (2000). And "all" unambiguously "means all." *Knott v. McDonald's*  
 21 Corp., 147 F.3d 1065 (9<sup>th</sup> Cir. 1998). The ordinary meaning of "all" is  
 22 "[t]he whole of," "every, all kinds, all sorts," and "any whatever."  
 23 Random House Webster's Unabridged Dictionary 54 (2d ed. 2001). "'All'  
 24 is an inclusive adjective that does not leave room for unmentioned  
 25 exceptions." *Hertel* at \*3, see *Nicolai* at \*3.

26 Plaintiff argues when Congress enacts a statute exempting each  
 27

1 defendant from all state and local taxation, there is a hidden  
2 exception for certain kinds of tax, including excise taxes. Plaintiff  
3 assumes a distinction exists between direct taxes and excise taxes  
4 which matters in the context of entity exemptions at issue in this  
5 case. Plaintiff's reading of the statute, however, is not convincing  
6 as it would mean that when Congress exempts an entity from "all  
7 taxation" it is only exempting that entity from direct taxes. The  
8 Supreme Court has recently reaffirmed there are only three types  
9 of direct taxes: capitations (taxes paid by every person "without  
10 regard to property, profession, or any other circumstance"), taxes on  
11 personal property, and taxes on real property. See *Nat'l Fed'n of*  
12 *Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2598-99 (2012). The transfer  
13 taxes here are clearly not capitations, and the statutes here  
14 separately provide an exclusion for taxes directly on real property.  
15 Accordingly, the only direct tax remaining would be a tax on personal  
16 property. Congress would unlikely have said that defendants were  
17 exempt from "all taxation" if it only meant they were exempt from  
18 personal property taxes. Plaintiff's argument that excise taxes and  
19 direct taxes are treated differently does not lead to a logical end  
20 and is not supported by the plain language of the statute.

21 The Court finds that a straight-forward interpretation of "all  
22 taxation" has to include the State and County real estate transfer  
23 taxes here, which impose a tax on the "seller or grantor" when a deed  
24 or other instrument of conveyance is recorded during the transfer of  
25 real property. In other words, the unambiguous statutes lead to the  
26 conclusion that when Congress said "all taxation," it meant *all*  
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1 taxation. Because the statutes are clear, this Court will not second-  
2 guess Congress and create a new exception in the statutes for state  
3 and local real estate transfer taxes. The conclusion that the plain  
4 language of the statute should control here is reinforced by Supreme  
5 Court precedent. See *Fed. Land Bank of St. Paul v. Bismarck*  
6 *Lumber Co.*, 314 U.S. 95 (1941).

7 Finally, plaintiff simply has not submitted any evidence specific  
8 to the statutes here, e.g., legislative history, that would suffice to  
9 overcome the plain language of the statute and establish that Congress  
10 used "all taxation" in some more specialized way.

#### 11 **IV. CARVE-OUT CLAUSES DO NOT APPLY**

12 Defendants argue that Congress crafted but one exception in each  
13 Exemption Statute allowing Defendants' "real property" to be "subject  
14 to" taxation. 12 U.S.C. §§ 1452(e), 1723a(c)(2), 4617(j)(1), (2). This  
15 narrow carve-out defeats any attempt to infer a broader exception:  
16 "When Congress provides exceptions in a statute, it does not follow  
17 that courts have authority to create others. The proper inference ...  
18 is that Congress considered the issue of exceptions and, in the end,  
19 limited the statute to the ones set forth." *United States v. Johnson*,  
20 529 U.S. 53, 58 (2000); see also *Hertel* at \*3 (explicit exception in  
21 Exemption Statutes supports finding that there are no "unmentioned  
22 exceptions"); *Nicolai* at \*3 (similar). No court has ever construed  
23 the language of the carve-out to include excise taxes like the  
24 Transfer Tax-rather courts have construed materially identical  
25 statutes as expressly providing that no tax other than that for real  
26 property may be imposed. See *Oakland Cnty. v. Fed. Hous. Fin. Agency*,

1 871 F. Supp. 2d 662, 667 (E.D. Mich. 2012) (transfer taxes are excise  
2 taxes, not taxes on real property); *Hager*, 882 F. Supp. 2d at 112  
3 (determining that similar D.C. taxes are excise taxes on transfers,  
4 not taxes on the real property itself); *Hertel* at \*6 (making same  
5 determination regarding Michigan transfer taxes); *Nicolai* at \*2-3  
6 (same); *Cnty. of Fairfax v. U.S. F.D.I.C.*, No. 92-0858(RCL), 1993 WL  
7 62247, at \*2, \*5 (D.D.C. Feb. 25, 1993).

8 Plaintiff disagrees arguing that *United States v. Wells Fargo*  
9 *Bank*, 485 U.S. 351 (1988) confirms the understood meaning of "all  
10 taxation" as not encompassing indirect taxes such as the Transfer Tax.  
11 Plaintiff explains that in *Wells Fargo*, the Supreme Court determined  
12 that certain public housing obligations were not exempt from the  
13 estate tax, which is an excise tax. 485 U.S. at 355-56. Plaintiff  
14 asserts that the *Wells Fargo* Court relied on no less than four prior  
15 Supreme Court decisions, dating back nearly a century, to determine  
16 that "all taxation" does not include excise taxes. *Id.*

17 In contrast, Defendants argue that as an excise tax, the Transfer  
18 Tax does not fall within the Exemption Statutes' singular, narrow  
19 exception for taxation on real property. The carve-out permits  
20 taxation of property itself, not taxation that relates to property or  
21 taxation of transfers of property. Defendants note that *Wells Fargo*  
22 draws a clear distinction between taxes levied on property and taxes  
23 levied on entities when they transfer property, and *Wells Fargo*  
24 dictates that the latter is not a tax on property. Washington's  
25 statutory taxation scheme confirms this distinction. All real property  
26 is subject to taxation under the Property Taxes statute. Wash. Rev.  
27

1 Code § 84. By contrast, the Transfer Tax, triggered by the conveyance  
2 of real property, is assessed under the Excise Taxes statute. *Id.* at §  
3 82.45. It is not a tax imposed on the property itself. *Id.* §82.45.010.

4 This Court agrees with defense based on the statutes' plain text.  
5 In granting each of the defendants an exemption, Congress explicitly  
6 created a carve-out from the "all taxation" language by permitting  
7 taxes on real property. But Congress did not provide a similar carve  
8 out for the type of transfer taxes at issue here. "When Congress  
9 provides exceptions in a statute, it does not follow that courts have  
10 authority to create others. The proper inference . . . is that  
11 Congress considered the issue of exceptions and, in the end, limited  
12 the statute to the ones set forth." *Johnson*, 529 U.S. at 58. Indeed,  
13 no court has ever construed the language of the carve-out to include  
14 excise taxes like the Transfer Tax at issue in the instant case.

15 **V. EXEMPTION STATUTES ARE CONSTITUTIONAL**

16 Plaintiff's contend that the Exemption Statutes are not  
17 constitutional because the Enterprises are not federal  
18 instrumentalities but rather private entities. Plaintiff argues that  
19 because the Enterprises are private entities, Congress is overstepping  
20 its bounds under the Interstate Commerce Clause and cannot legislate  
21 in an area purportedly reserved to the states.

22 Defendants disagree stating the Exemption Statutes apply  
23 regardless of whether the Enterprises are deemed federal  
24 instrumentalities because the Enterprises' undeniably broad exemption  
25 from "all [state and local] taxation" bars Plaintiff's claims.

26 Defendants, citing *First Agricultural National Bank v. State Tax*

1       Commission, explain that the Supreme Court held in that case that it  
2       was unnecessary to reach the constitutional question of whether today  
3       national banks should be considered nontaxable as federal  
4       instrumentalities. 392 U.S. 339, 341 (1968). Further, the *First*  
5       *Agricultural* court held that any changes to the "state taxation of  
6       national banks . . . must come from the Congress." *Id.* at 346.  
7       Defendants conclude where Congress has statutorily exempted an entity  
8       from taxation, it makes no difference whether the exempt entity is  
9       deemed a private enterprise as opposed to a federal instrumentality.

10       This Court finds Plaintiff's allegations to the contrary are  
11       flawed. Defendant Fannie Mae is a corporation chartered by Congress  
12       to "establish secondary market facilities for residential mortgages,"  
13       in order to "provide stability in the secondary market for residential  
14       mortgages," and "promote access to mortgage credit throughout the  
15       Nation." 12 U.S.C. § 1716. Defendant Freddie Mac is similarly a  
16       corporation chartered by Congress for substantially the same purposes  
17       as Fannie Mae. *Id.* § 1451.

18       Defendant FHFA, is an independent federal agency, created under  
19       the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289,  
20       122 Stat. 2654, codified in part at 12 U.S.C. § 4617, et. seq. The  
21       Director of FHFA placed Fannie and Freddie into conservatorships "for  
22       the purpose of reorganizing, rehabilitating, or winding up [their]  
23       affairs . . ." 12 U.S.C. § 4617(a)(2). As Conservator, the FHFA  
24       succeeds to all of the "rights, titles, powers, and privileges" of  
25       Fannie and Freddie, and also has the power to "operate" them, "conduct  
26       all [of their] business," and "preserve and conserve" their "assets

1 and property." *Id.* § 4617(b) (2).

2 When Congress created defendants, it expressly exempted them from  
 3 "all" state and local taxes except for taxes on real property. Fannie  
 4 Mae's charter provides:

5 The corporation, including its franchise, capital,  
 6 reserves, surplus, mortgages or other security  
 7 holdings, and income, shall be exempt from  
 8 all taxation now or hereafter imposed by any  
 9 State, . . . county, municipality, or local taxing  
 10 authority, except that any real property of the  
 11 corporation shall be subject to State, . . .  
 12 county, municipal, or local taxation to the same  
 13 extent as other real property is taxed.

14 12 U.S.C. § 1723a(c) (2).

15 Similarly, Freddie Mac's charter provides:

16 The Corporation, including its franchise,  
 17 activities, capital, reserves, surplus, and  
 18 income, shall be exempt from all taxation now or  
 19 hereafter imposed by any . . . State, county,  
 20 municipality, or local taxing authority, except  
 21 that any real property of the Corporation shall be  
 22 subject to State, . . . county, municipal, or  
 23 local taxation to the same extent according to its  
 24 value as other real property is taxed.

25 12 U.S.C. § 1452(e).

26 Additionally, when Congress enacted the Housing and Economic  
 27 Recovery Act, it granted the FHFA a similar exemption in its role as  
 28 Conservator:

29 The Agency [as Conservator], including its  
 30 franchise, its capital, reserves, and surplus, and  
 31 its income, shall be exempt from all taxation  
 32 imposed by any State, county, municipality, or  
 33 local taxing authority, except that any property  
 34 of the Agency [as Conservator] shall be subject to  
 35 State, territorial, county, municipal, or local  
 36 taxation to the same extent according to its value  
 37 as other real property is taxed . . . .

38 12 U.S.C. § 4617(j) (2).

39 The Court finds that there is no requirement that an entity, such  
 40 as the Enterprises, be a federal instrumentality in order to receive a

1 benefit involving a statutory exemption from taxation. Even in those  
 2 Supreme Court cases<sup>1</sup> where federal contractors were determined not to  
 3 be constitutionally immune because they were not "federal  
 4 instrumentalities," Congress has the power to expand such immunity  
 5 from state taxation. See *SEPTA v. Pa. Pub. Util. Comm'n*, 826 F. Supp.  
 6 1506, 1511 n.9 (E.D. Pa. 1993) (Congress acted within its Commerce  
 7 Clause authority in enacting a statute exempting local commuter  
 8 authorities that were not federal instrumentalities from state and  
 9 local taxes); *New Jersey v. Consol. Rail Corp.*, 690 F. Supp. 1061,  
 10 1065-66 (Reg'l Rail Reorg.Ct.1988) (Congress can "exempt a private,  
 11 for-profit corporation from state taxation.")

12 Finally, Congress's power is especially dispositive where, as here,  
 13 Congress created the exempt entity to pursue a mission Congress deemed  
 14 important. See *Carson v. Roane-Anderson Co.*, 342 U.S. 232, 234 (1952)  
 15 (Congress validly provided immunity for Atomic Energy Commission's  
 16 private, for-profit contractors).

17 It is clear Congress created the Enterprises to further the  
 18 important national interest in facilitating affordable home mortgages.  
 19 Thus, Congress had "the power to preserve and protect functions [it  
 20 has] validly authorized" the Enterprises to undertake, regardless of  
 21 whether they are federal instrumentalities. By enacting the Exemption  
 22 Statutes, Congress provided a clear mandate that Defendants are exempt

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24       <sup>1</sup>*Arizona Dep't of Revenue v. Blaze Constr. Co., Inc.*, 526 U.S.  
 25 32, 38 (1999) ("[w]ether to exempt [government contractor] from  
 26 Arizona's transaction privilege tax . . . rests . . . with Congress");  
 27 *United States v. New Mexico*, 455 U.S. 720, 737 (1982) (Congress must  
 28 act to grant tax immunity to federal contractors); *First Agricultural  
 National Bank v. State Tax Commission*, 392 U.S. 339, 341 (1968).

1 from materially all state and local taxation.

2       The Court is sensitive to the current budgetary pressures on  
3 municipalities such as the City of Spokane here, as well as fiscal  
4 realities which are the by-product of the loss of monies resulting  
5 from foreclosures and subsequent property transfers by the Enterprises  
6 rather than by private homeowners. Overall, however, Defendants'  
7 arguments are in accord with the plain language of the statutes and  
8 with the Supreme Court jurisprudence. If this Court were to adopt the  
9 Plaintiff's arguments, it would have to ignore a common sense reading  
10 of the statutes and take a somewhat distorted view of precedent. In  
11 particular, Plaintiff's interpretation of *Bismarck* as applying only to  
12 federal instrumentalities simply is not supported by the text of that  
13 decision. Moreover, their reading of *Wells Fargo* as applying more  
14 broadly to tax exemption statutes involving property carries that  
15 decision too far, especially in light of the Supreme Court's failure  
16 to discuss or cite any of the *Bismarck* line of cases in *Wells Fargo*.  
17 Thus, the Court interprets the tax exemption statutes here as  
18 exempting Defendants from the Transfer Tax, following, as it must,  
19 *Bismarck*.

20 **VI. CONCLUSION**

21       The Exemption Statutes' plain text requires that except for the  
22 narrow carve out provision, the Enterprises are exempt from all state  
23 and local taxation on the entities themselves, including excise taxes  
24 such as the Transfer Tax. Relying on the Exemption Statutes'  
25 unambiguous language, the Enterprises are statutorily exempt because  
26 the Exemption Statutes immunize the Enterprises from all taxation and  
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1 a transfer tax is "indisputably a tax on" the Enterprises that "thus  
2 falls within the statutory exemption." See *Hager*, 882 F. Supp. 2d at  
3 112. Accordingly, the Court finds that Plaintiff's Amended Complaint  
4 fails to state a claim upon which relief can be granted, and this  
5 action is therefore dismissed with prejudice.

6 **IT IS ORDERED** that:

7 1. Defendants' Motion to Dismiss Plaintiff's Amended Complaint,  
8 **ECF No. 33**, filed on March 15, 2013, is **GRANTED**. Plaintiff's claims  
9 are hereby dismissed with prejudice.

10 2. The file shall be **CLOSED** in this matter.

11 **IT IS SO ORDERED.** The District Court Executive is directed to  
12 enter this Order.

13 **DATED** this 28th day of June, 2013

14 *s/Lonny R. Sukko*

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15 LONNY R. SUKO  
16 UNITED STATES DISTRICT JUDGE